79-259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. A-14

In Re:
MULTIDISTRICT VEHICLE AIR POLLUTION

AMF INCORPORATED,
Petitioner

v.

GENERAL MOTORS CORPORATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Of Counsel:

BERGSON, BORKLAND, MARGOLIS & ADLER
11 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 462-5930

HOWARD ADLER, JR.
DONALD L. HARDISON
MARC S. PALAY

ROGERS HOGE & HILLS
90 Park Avenue
New York, New York 90212
(212) 953-9200

GREGOR F. GREGORICH

Attorneys for Petitioner

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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AMF Incorporated (AMF) petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on February 14, 1979.

OPINION BELOW

The opinion of the court of appeals is reported at 591 F.2d 68. A copy of the opinion below is reprinted in the Appendix.

JURISDICTION

The court of appeals entered judgment on February 14, 1979. The court denied a petition for rehearing and

suggestion for rehearing *en banc* on April 18, 1979. (Pet. App. 16a.) On July 11, 1979, Mr. Justice Stevens extended the time to petition for certiorari to and including August 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The court of appeals in this private antitrust case assumed for purposes of decision that defendant automobile manufacturers conspired to boycott AMF's automotive pollution control device. Summary judgment dismissing AMF's complaint was upheld on the sole ground that plaintiff's cause of action arose upon defendants' conspiratorial announcement in August 1964 that they would develop and exclusively use their own emission control system and did not intend to purchase plaintiff's device. Defendants' late 1964 announcement was both prospective and contingent. No purchases were to be made until the Spring of 1965, and, as of late 1964, defendants' emission control system had been neither developed nor approved by state authorities. The critical date for consideration of the applicability of the statute of limitations is January 10, 1965, and the following questions are presented:

1. Whether the ruling below that plaintiff's antitrust cause of action for market exclusion is time-barred because defendants' overt acts subsequent to and in furtherance of their conspiratorially-announced intention to boycott AMF were "but unabated inertial consequences of [their] pre-limitations action" was erroneous and in conflict with the principles governing application of the statute of limitations in cases of continuing conspiracies enunciated by this Court in *Zenith Radio Corp.*

v. Hazeltine Research, Inc., 401 U.S. 321 (1971), and by the courts of appeals in other circuits.

2. Whether AMF could have made the requisite nonspeculative showing of the fact and amount of damages based on defendants' prospective and contingent announcement that they would not purchase AMF's smog control device if they could successfully develop their own system and obtain required state approval, where state law required that all cars sold in the state be equipped with a certified device like plaintiff's whether factory installed or not.

3. Whether this Court's rule disfavoring the use of summary judgment in antitrust cases prohibits summary disposition of disputed issues concerning the application of the statute of limitations where the jury could have found either (a) that plaintiff continued its efforts to enter the market during the limitations period but was rebuffed by defendants' continued conspiratorial acts; or, (b) that market contingencies rendered the fact and amount of damages resulting from pre-limitations conduct speculative and unascertainable prior to the critical statute of limitations date.

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . .

Section 4B of the Clayton Act, 15 U.S.C. § 15b, provides in pertinent part:

Any action to enforce any cause of action under Sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued . . . .

STATEMENT

1. The Facts:

This is a private antitrust suit alleging a conspiracy by defendant automobile manufacturers and their trade association to boycott AMF's automotive pollution control device and to exclude it from the market for such equipment, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

In 1960, in an effort to deal with the problem of automotive pollution, the California Legislature established the Motor Vehicle Pollution Control Board ("MVPCB" or "Board") and authorized it to issue "Certificates of Approval" for those exhaust pollution control devices found capable of reducing hydrocarbon (HC) and carbon monoxide (CO) emissions to designated standards.[1] The statute as applied provided that beginning with the first model year twelve months or more after the MVPCB had certified two or more devices, every new car registered in the State of California would have to be equipped with a certified device.

Recognizing the potential market for exhaust control devices created by the California statute (and the prospect of similar legislation in other states and nationally), AMF in 1961 entered into a program for the development of an after-burner design for controlling HC and CO in automotive exhaust. Prototypes of the AMF device were

[1] 1960 Cal. Stats. 1st Ex. Sess., C.23 and CAL. HEALTH & SAFETY, C.3, § 24,383, § 24,386.

placed in the state testing program in California and submitted to the MVPCB for certification.

Meanwhile, defendants and co-conspirators—the major domestic automobile manufacturers and their trade association (the AMA)—had entered in a "cooperative" program, features of which involved joint testing of "outside" technology and execution of a Cross-Licensing Agreement. The purpose of this program was to delay the installation of emission controls, which enhance neither automotive performance nor styling, and to place the development and marketing of pollution control devices "on a non-competitive basis" if and when emission controls became mandatory (R. 4700-01).

Defendants learned in late 1963 that the MVPCB was "very confident" of approving exhaust control devices manufactured by AMF and others in sufficient time to require their use as early as the 1966 model year. (R. 4924.) Pursuant to their plan to delay the use of exhaust control devices as long as possible, defendants in 1964 adopted a resolution that they would comply with the California exhaust standards "*starting with* 1967 models" (R. 4942, emphasis added) and publicly announced their joint decision only to "make use of developments evolved through the industry cooperative program" (R. 4950-51). That announcement was designed to chill the interests of third-party device manufacturers such as AMF (R. 4945; R. 4958). Those manufacturers, however, continued development efforts, which culminated in the certification by the State of California on June 17, 1964 of the AMF Smog Burner and three other third-party devices. This meant that it would be unlawful to register a new 1966 passenger vehicle in California unless it was equipped with one of these certified devices.

Following AMF's certification, the defendants assured each other that no one would "break ranks" from the 1967 model year agreement and factory install any of the recently-certified devices. (R. 5037, and *see* R. 6091; R. 5172; R. 6173-74.) Nevertheless, defendants were confronted with a dilemma. Since they knew AMF would tool up for a one-year market (R. 5457-58), defendants had to choose among the following courses: (1) install the less expensive, more effective AMF device at the factory, (2) allow the AMF unit to be installed locally in California (a contingency for which AMF was planning), or (3) promptly try to develop their own "solution" by model year 1966 (*i.e.*, the fall of 1965). While defendants had repeatedly sworn that the last alternative was absolutely impossible (R. 5166), this was the course jointly chosen and announced—even though in mid-1964 no industry device (except Chrysler's) was even in the prototype certification stage. (*See* Barr Dep. Def. Ex. 33; R. 5196-97; Sherman Dep. 1380-82, R. 6086-87; Berry Dep. 110-111, R. 6028-29.)

Pursuant to this agreement, defendants announced at the August 12, 1964 MVPCB meeting that they were going to advance installation of industry systems from 1967 to 1966 models, thereby avoiding the requirement to use the AMF Smog Burner or other certified devices. (*See* R. 4305; R. 5258.) Finally, although there was virtually no cost data for the undeveloped and uncertified industry "air injection system," defendants publicly represented that their system would have a selling price to the public no greater than that of the least costly certified device, the AMF Smog Burner (R. 5393-95).

Throughout the Fall and Winter of 1964, the industry's "air injection system" remained in a rudimentary state of development, and, as defendant American Motors

admitted, as late as October 1964, "certification was not a foregone conclusion, at least for GM, Ford and American Motors" (AMC Reply at 18, R. 4452).

In fact, for some vehicles, defendants did not even try to utilize the industry system, but instead sought exemptions from the MVPCB. Board regulations required, however, that defendants submit proof of non-availability of certified devices in support of requests for exemptions. Therefore, the use of Smog Burner or other outside devices on *any* vehicle would compromise all exemption requests. (*See* R. 4995-96.) To meet the non-availability criterion, GM falsely represented in its request for exemptions that certified devices would require extensive body changes in certain vehicles and hence were not "available" (R. 5234-35). While this representation was false, it was successful. On January 20, 1965, after GM defended its exemption requests before the Board (Steinhagen to Barr, 1/25/65), all exemption requests were granted (Searing Dep. Ex. P-28; R. 5828).

Nevertheless, recognizing the potential preference for its device over defendants' costly and less effective system, AMF continued its efforts to market the Smog Burner throughout the first half of 1965.[2] Thus, AMF made test installations of prototype Smog Burners on a variety of foreign models throughout the Winter and Spring of 1965 (Ulyate Aff. ¶ 11). Defendants, however, induced these foreign manufacturers to sign the Cross-Licensing Agreement in June, 1965, precisely at the time AMF was trying to sell them its device.

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[2] Depositions of Gott at 41-42, 76; Lipchik at 195-202; Davis at 22; Ulyate at 305-06; Cotta at 6; Keen at 6; Seltzer at 8; Green at 15; Williamson at 5.

Further, in February of 1965, AMF unconditionally quoted International Harvester, a named co-conspirator, a firm price of "$55 per Smog Burner" for 7,000 units, further stating that the price would be considerably less if "volume production" were achieved.[3] On April 8, 1965, AMF called on Ford and again offered to supply this defendant the Smog Burner (R. 5831). Ford rejected the offer even though at that time it appeared questionable whether Ford could qualify its fleet under the state program. (*See* R. 5776-77; R. 5712; R. 5569; Homfeld Dep. at 132, R. 6103.)

Thus, in the Spring of 1965, within the limitations period, the AMF Smog Burner project was still very much alive, and AMF was continuing preparations for ultimate market entry. For example, in the event defendants failed to achieve certification of their own devices, but refused to factory install plaintiff's units, AMF had detailed alternative plans for installing Smog Burners at dealer and other locations within the State of California.[4] On April 21, 1965, a substantial appropriation was approved by AMF management to maintain the Smog Burner project "for the second quarter of 1965" (R. 5832).

In the meantime, during the Fall of 1964 and the Winter of 1965, defendants continued with their efforts to develop their own pollution control system and to

[3](R. 5829). On March 26, 1965, AMF wrote to International Harvester again confirming that the February price was a "firm quotation" based on "your request for quotation." (Lipchik to Bail, 3/26/65).

[4]*See* Seltzer Dep. at 166-68; Lipchik Dep. at 142-43; AMF Progress Report-Smog Burner, 8/12/64, AMF 1302A.

obtain the required state certification. These efforts included development of the Saginaw air pump which was jointly financed by GM, Ford and AMC and the uniform announcement by the same three companies in July of 1965 of below-cost prices that were specifically aimed at matching AMF's price.[5] Thus, these defendants represented to the Board in July, 1965 that the price of their devices would be "no more than $50" to the car buyer (Misch Dep. at 551), even though they knew that such a price would lead to very substantial losses.[6] As a direct result of their on-going joint development and testing activities and this below-cost pricing, defendant's system was certified in July of 1965. The August 1964 boycott decision was thereby finally effectuated, and AMF excluded from the market.

2. Proceedings Below:

The district court, on the eve of trial, granted summary judgment from the bench. No opinion was rendered and the court adopted defendants' lengthy proposed findings virtually verbatim. The court based summary judgment principally on its "findings" that defendants' rejections of AMF were unilateral, that there was no AMF device to boycott since it was only a prototype, and that the action was barred by the statute of limitations.

The court of appeals upheld summary judgment on the sole ground that the four-year statute of limitations barred suit, 15 U.S.C. § 15b. The court of appeals

[5]*See* R. 5394; Mtg. of Ford Prod. Planning Comm., 5/11/65, Secrest Dep. Exs.

[6]Ford, for example, lost in excess of 4 million dollars on its device in model year 1966 alone. GM lost 6.8 million dollars on its device for that year. (*See* R. 4318-19.)

determined that January 10, 1965, was the critical date for its statute of limitations analysis (Pet. App. 6a).[7] It first considered whether defendants had committed overt acts in furtherance of their conspiracy after January 10, 1965 which damaged AMF, in which case a cause of action based on those acts would not be barred. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). The court "found," however, that "the undisputed record indicates that appellees' decision not to purchase the afterburner devices from AMF were final prior to January 10, 1965" and that "AMF's exclusion from the afterburner market was complete prior to January 10, 1965" (Pet. App. 8a). The court characterized AMF's efforts to sell to Ford and its co-conspirator International Harvester as "forlorn inquiries by one all of whose reasonable hopes had been previously dashed." (*Id.* at 10a.) Since, in the court's view, "the 1964 decisions, as to AMF, were irrevocable, immutable, permanent and final," any "[a]cts subsequent to January 10, 1965 . . . were 'but unabated inertial consequences of some pre-limitation action'" and were not acts giving rise to a cause of action. (*Id.* at 11a, *quoting Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976).)

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[7] January 10, 1965 is the critical date for purposes of the statute of limitations because four years after that date, on January 10, 1969, the United States filed a suit involving the same subject matter. Thus, pursuant to the provisions of Section 5 of the Clayton Act, 15 U.S.C. §16, the running of the statute in the present case was tolled until October 29, 1970, one year following conclusion of the Government's case by a consent decree entered on October 29, 1969. *See* United States v. Automobile Mfrs. Ass'n, 307 F.Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom.* New York v. United States, 397 U.S. 248 (1970). The present complaint was filed on October 23, 1970.

The second issue addressed by the court was whether, as of January 10, 1965, the fact or amount of AMF's damages was speculative or unprovable. *See Zenith Radio*, 401 U.S. at 339. On this issue, the court ruled that AMF had been finally and completely injured by defendants' August 1964 announcement that they intended uniformly to adopt the industry's emission control system and would not use AMF's device (Pet. App. 14a-15a). It concluded that since the *entire* population of 1966 California automobiles could have been projected at any time between August 1964 and January 10, 1965, plaintiff's damages were not more speculative then than they would be today. (*Id.*) In so holding, the court has ignored fundamental market contingencies and uncertainties which made it impossible for AMF to know, prior to January 10, 1965, whether it would suffer total, partial or no exclusion from the automotive pollution device market.

REASONS FOR GRANTING THE WRIT

This case raises issues of general importance concerning application of the statute of limitations and the use of summary judgment in antitrust cases:

First. The court of appeals has held AMF's cause of action barred by the statute of limitations on the curious and erroneous ground that continuing overt acts set in motion by defendants' pre-limitations boycott decision were "but unabated inertial consequences of" that decision (Pet. App. 11a). The rule announced below is erroneous and, if followed in other circuits, would unduly restrict private antitrust enforcement. It is, moreover, in direct conflict with this Court's holding in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S.

321 (1971), and with leading decisions of the Third, Fifth and Tenth Circuits.[8]

Second. The court of appeals improperly applied the *Zenith* rule that an antitrust cause of action does not accrue until the fact and amount of damages are reasonably ascertainable. Specifically, it held that AMF's cause of action accrued when defendants *announced* their intention to boycott the AMF device, even though that announcement was both prospective and contingent. Contrary to the ruling of the court below, it would have been impossible as of January 10, 1965, for AMF to know whether it would ultimately suffer complete, partial or no exclusion from the state-mandated market for exhaust control devices. In those circumstances, an ability to project the *entire* California automobile market, on which the court of appeals rests its decision, is irrelevant. The decision below is both incorrect and in conflict with decisions in other circuits that have correctly applied the *Zenith* rule in cases where, as here, the impact of an antitrust violation can be affected by future and unknowable actions, decisions or market developments. *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972); and *see Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 138-39 (3d Cir. 1978); *Continental-Wirt Electronics Corp. v. Lancaster Glass Corp.*, 459 F.2d 768, 770 (3d Cir. 1972).

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[8] Fitzgerald v. General Dairies, Inc., 590 F.2d 874 (10th Cir. 1979); Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127 (3d Cir. 1978); Imperial Point Collonades Condominium v. Mangurian, 549 F.2d 1029 (5th Cir. 1977), *cert. denied*, 434 U.S. 859 (1978); Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976). *See also* Berkey Photo, Inc. v. Eastman Kodak Co., [1979] TRADE REG. REP. (CCH) ¶ 62,718 at 78,020-21 (2d Cir. 1979); Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570, 572-73 (4th Cir. 1976).

Third. The Court of Appeals resolved highly contested fact issues against AMF, thereby flouting this Court's decisions in *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464 (1962), and *Norfolk Monument Co. v. Woodlawn Memorial Gardens*, 394 U.S. 700 (1969). For example, it improperly found that "AMF itself was convinced by the last quarter of 1964 that it was out of the market" (Pet. App. 11a), despite clear evidence that AMF made firm offers and contemplated "volume production" in February 1965 and remained active in the market until at least mid-1965 (*see* p. 7-8 *supra*).

Review by this Court is necessary to correct the manifest errors below: to eliminate the lack of uniformity among circuits in the interpretation and application of both the continuing conspiracy and nonascertainability aspects of *Zenith*; and, finally, to make clear to all courts in the federal system that there is a right to have a jury determination of disputed fact questions raised by defenses under the statute of limitations.

1. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 328 (1971), this Court affirmed that each injurious act of a continuing conspiracy gives rise to a new cause of action. Thus, even though a conspiracy is formed and some overt acts are committed more than four years before suit, an action is not barred based on additional injurious acts that occur in the four-year period preceding suit.

Relying heavily on *Zenith*, the Court of Appeals for the Fifth Circuit has taken the lead in establishing the rule, of great significance in applying the statute of limitations, that "continuing antitrust conduct resulting in a continued invasion of a plaintiff's rights may give rise to continually accruing rights of action." *Poster*

Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976).

At the same time, the Fifth Circuit has recognized that there are more likely to be continually accruing causes of action in refusal to deal or market exclusion cases than in other types of antitrust violations. This is because exclusion from an industry "while perhaps unequivocal . . . [is] not of necessity permanent." *Poster Exchange*, 517 F.2d at 127. Consequently, any "act or word" perpetuating plaintiff's exclusion (*id.* at 128) or any "reiteration of defendants' refusal to deal" gives rise to a new antitrust cause of action. *Imperial Point Colonnades Condominium v. Mangurian*, 549 F.2d 1029, 1035 (5th Cir. 1977), *cert. denied*, 434 U.S. 859 (1978).

The significance of post-*Zenith* case law establishing that new causes of action accrue based on continuing injurious conduct is clear. Defendants' 1964 boycott announcement was not self-executing. It related to the future procurement and installation of smog control devices, and the success of the conspiracy required substantial implementing conduct within the limitations period. Nevertheless, the court of appeals has held AMF's claim to be time-barred. In doing so it has announced a rule of law that is erroneous on its face and in conflict with the decisions of the Fifth and other circuits interpreting *Zenith*.

The error of the court below stemmed from a complete misreading of the opinion in *Poster Exchange*. In that case, the Fifth Circuit established as a logical and proper *caveat* to the rule concerning continually accruing rights of action that damages which occur within the four years preceding suit, but which are solely the "abatable but

unabated inertial consequences of some pre-limitations action" are barred by the statute of limitations. *Poster Exchange*, 517 F.2d at 128. As the Fifth Circuit later explained in *Mangurian*, "no new cause of action accrues for the damages occurring within the limitations period *because no act committed by the defendant within that period caused them.*" *Mangurian*, 549 F.2d at 1035 (court's emphasis).[9] The key distinction is between injurious conduct or acts occurring within the limitations period and the mere accumulation of increased damages which "result *solely* from [pre-limitations] acts." *Id.* (emphasis added.)

The court of appeals has egregiously misinterpreted the language in *Poster Exchange* to mean that overt acts occurring within the limitations period which continued an established pre-limitations course of illegal conduct do not give rise to a new cause of action. The court recognized that within the limitations period, defendants engaged in numerous overt acts, including additional refusals to deal with AMF, predatory pricing announcements aimed specifically at foreclosing utilization of the AMF device, and a series of acts designed to achieve

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[9] A second qualification or *caveat* recognized by the Fifth Circuit in *Poster Exchange* and *Mangurian* is that where an "actionable wrong is by its nature permanent at initiation without further acts" suit must be brought within four years of the occurrence of the act (*Poster Exchange*, 517 F.2d at 126-27). As discussed below (pp. 19-21), the court of appeals committee grave error by resolving highly-disputed fact questions relevant to this issue against plaintiff. For example, the court found that AMF already had been driven out of the control device business by the end of 1964, and thus could not have suffered injury as a result of additional overt acts by defendants in 1965, although many of these acts were specifically directed against AMF, which was continuing its attempts to enter the market.

certification of their own "industry" device (Pet. App. 5a, 6a, 9a). Without these additional overt acts, defendants could have been compelled to deal with plaintiff by force of the California law requiring use of a certified device on 1966 models (Pet. App. 4a). Inexplicably, however, the court held that defendants' "[a]cts subsequent to January 10, 1965, . . . were but 'unabated inertial consequences of some pre-limitations action'" (Pet. App. 11a), specifically, defendants' "1964 rejection of the Smog Burner" from which, in the court's erroneous understanding, "all injury to AMF necessarily resulted. . . ." (*Id.*)

Contrary to the court's holding, "acts" subsequent to and in implementation of defendants' 1964 decision do constitute injurious conduct within the limitations period. It is clear, moreover, that the acts occurring within the limitations period were not "inconsequential," "inertial," or "tangential." Rather they were affirmatively directed against AMF and were actively undertaken to assure success of the conspiracy. These acts included: (a) predatory below-cost pricing in July of 1965, specifically aimed at foreclosing AMF's device from the market; (b) false representations to the MVPCB that use of plaintiff's device would require extensive body changes, thus rendering AMF's product "unavailable" for models for which the industry sought exemption; (c) joint development of an air pump which was vital to certification of the industry's device; (d) continued enforcement of the Cross-Licensing Agreement, including inducement of foreign manufacturers to join the Agreement at a time when AMF was trying to sell its device to them. (*See* pp. 7-9 *supra.*)

In short, the court below failed to understand that plaintiff's exclusion from the market was not complete until the occurrence of additional overt acts well within the limitations period. *See Fleer Corp. v. Topps Chewing Gum, Inc.*, 415 F.Supp. 176, 181 (E.D. Pa. 1976), *appeal*

dismissed without opinion (3d Cir. 1977), *cert. denied*, 435 U.S. 970 (1978). The case thus stands as a dangerous precedent for the immunization of anticompetitive acts committed in the course of a continuing conspiracy. This Court should make clear that continued conduct which violates the antitrust laws by excluding a competitor from a market will subject the antitrust violator to continued antitrust liability.

2. In *Zenith*, this Court held that the statute of limitations does not begin to run until the damages from a conspiratorial overt act are actually suffered and are reasonably ascertainable (401 U.S. at 339-42). In *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972), the Second Circuit held that where plaintiff Louisville, a distributor of a chemical product (MH-30), was terminated by its supplier for failure to go along with certain illegal programs, a suit filed more than four years later was not barred since plaintiff would have been unable to prove its damages with sufficient certainty until a later point in time within the limitations period. (*Id.* at 885.) This was because "Louisville had no means of knowing [at the time of its termination] to what extent it would be able to fill its requirements of MH-30 from other distributors or at what price." (*Id.*) In short, the extent of Louisville's exclusion from access to supplies, and hence the amount of its damages, could not have been determined at the time of defendants' last overt act pursuant to the conspiracy. *See Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 139 (3d Cir. 1978); *Continental-Wirt Electronics Corp. v. Lancaster Glass Corp.*, 459 F.2d 768, 770 (3d Cir. 1972).

The court of appeals in the instant case failed to recognize that precisely the same type of market con-

tingencies and uncertainties precluded suit by AMF in 1964. Rather, it reasoned that, based on defendants' announcement in 1964 of their "*intention* not to use the Smog Burner," a cause of action for *absolute exclusion* from future markets could have been brought by AMF (Pet. App. 14a, emphasis added).

Notwithstanding defendants' announced intention in late 1964, and their expressed preference for an industry solution to the requirement for exhaust control devices, it is undisputed that defendants had no alternative to the AMF Smog Burner until mid-1965. Thus, defendants have admitted that the 1964 boycott decision was contingent upon obtaining certification of their own devices (Heinan Dep. at 1374, R. 6083). *See also* AMC Reply at 18, R. 4452. Moreover, even if some or all of defendants persisted in refusing to factory-install the AMF device, the possibility remained in 1964 that the State of California would require in-state installation, a contingency for which AMF was planning. (*See* p. 8 *supra.*). Further, defendants' exemption requests were not acted upon until January 20, 1965. Clearly, in these circumstances, AMF could not have asked a jury to speculate in 1964 that it would be excluded absolutely from the state-mandated market for control devices and would have been able to make no sales whatsoever in 1965 or future years. *See Ansul,* 448 F.2d at 885. It can be taken as certain that defendants would have contended that a claim of "absolute exclusion" was premature because GM, Ford and AMC did not have certified devices in hand and they were only in a rudimentary state of development. (*See id.*) Thus, in 1964, plaintiff "had no means of knowing to what extent" it might be called upon to supply exhaust control devices

in California. (*Id.*)[10] Review by this Court is required to clarify the rule in *Zenith* and to harmonize its application by the courts of appeals.

3. In *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473 (1962), and *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700, 704 (1969), this Court cautioned that "summary procedures should be used sparingly in complex antitrust litigation. . . ." Moreover, in any case it is axiomatic that summary judgment can be granted only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

These standards are fully applicable to summary dispositions of antitrust cases on the ground they are time-barred by the statute of limitations. Thus, in *Fitzgerald v. General Dairies, Inc.,* 590 F.2d 874 (10th Cir. 1979), the court of appeals held that where plaintiff alleged it was unlawfully excluded from the dairy business by the actions of defendants, the facts that plaintiff "felt there was a cause of action for antitrust violations" and that "a bankruptcy petition was filed before the four-year period of limitations" did not support summary judgment that the cause was time-barred. (*Id.* at 875.) Summary judgment was reversed for many of the reasons

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[10] By contrast, in the cases relied upon by the court of appeals there existed no market contingencies or uncertainties of any kind. In all of the cases cited, both injury and damages were final, complete and ascertainable upon occurrence of the challenged acts and practices. *See* City of El Paso v. Darbyshire Steel Co., 575 F.2d 521 (5th Cir. 1978), *cert. denied,* 99 S.Ct. 1033 (1979); Charlotte Telecaster, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570 (4th Cir. 1976); Monona Shores, Inc. v. United States Steel Corp., 374 F.Supp. 930 (D. Minn. 1973).

argued here by petitioner. Thus, the court of appeals held that numerous fact questions were raised, including plaintiff's efforts to re-enter the market following bankruptcy and allegations of further overt acts by defendants preventing such re-entry within the four-year period, all of which should be resolved by the trier of facts and not by the court on summary judgment. *Id.* at 875-76. *See Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 138-39 & n.41 (3d Cir. 1978).

In the present case, however, the court of appeals arrogantly substituted its judgment for that of the jury on numerous critical fact questions including: (a) whether the conspiracy to exclude AMF continued into the limitations period; (b) whether AMF continued its attempts to enter the market, and (c) at what point AMF's damages ceased to remain speculative and contingent.

Repeatedly resolving disputed fact issues against plaintiff, the court made its own "finding" that "[n]othing [existed] in the record indicates other than that the 1964 decisions, as to AMF, were irrevocable, immutable, permanent and final" (Pet. App. 11a). The court simply ignored substantial evidence that defendants' original 1964 boycott decision was contingent upon certification of the industry system and that defendants themselves did not deem the 1964 announcement a knock-out blow, since they engaged in costly below-cost selling in 1965 to foreclose plaintiff and since they continued to refuse to deal with plaintiff well into the limitations period.[11]

[11] The court of appeals cites "lead time" requirements as one reason why defendant's 1964 decisions were "irrevocable" (Pet. App. ___). To the contrary, as of January 10, 1965 AMF's Smog

[footnote continued]

The court's treatment of plaintiff's continued efforts to sell its product in 1965 vividly demonstrates the inappropriateness of summary judgment. AMF quoted a firm price for the Smog Burner to International Harvester, a named co-conspirator, in February, 1965, and tried to sell the product to Ford two months later (p. 8 *supra*). The court of appeals cavalierly dismissed these events by stating, incorrectly, that the International Harvester quote "did not indicate production capability" (Pet. App. 5a) and by characterizing both offers as "forlorn inquiries by one all of whose reasonable hopes had been previously dashed" (*id.* 10a). Clearly, however, such questions as whether these inquiries were "forlorn," whether plaintiff's reasonable hopes and expectations already were dashed, and whether plaintiff had the ability to deliver the goods as stated to International Harvester are all matters which plaintiff is entitled to have resolved by a jury.[12]

Burner was in a far more advanced state of development than the uncertified industry air injection system and AMF had the capability to quickly launch production in the event orders were received. (*E.g.*, Lipchik Dep. at 26, 137, 139-49; AMF Progress Report at 11 (AMF 1302A); AMF Distribution Plan and Cost Estimate at 8, 10, 25, App. G., MVPCB Final Staff Report, Lipchik Dep. Ex. 13.) Moreover, nothing precluded purchase of the Smog Burner for the mid-1966 or even 1967 model years.

[12] The issue of whether AMF's damages were ascertainable prior to the limitations period also turns on many of the same fact issues discussed above, such as the contingent nature of defendants' 1964 refusals and the continued vitality of the Smog Burner project throughout the first half of 1965. These disputed issues of fact should not have been resolved against plaintiff on summary judgment. *See* Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127, 138-39 & n.41 (3d Cir. 1978); Continental-Wirt Electronics Corp. v. Lancaster Glass Corp., 459 F.2d 768, 770 (3d Cir. 1972).

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Of Counsel:

BERGSON, BORKLAND, MARGOLIS & ADLER
11 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 462-5930

HOWARD ADLER, JR.
DONALD L. HARDISON
MARC S. PALAY

ROGERS HOGE & HILLS
90 Park Avenue
New York, New York 90212
(212) 953-9200

GREGOR F. GREGORICH

Attorneys for Petitioner

August 16, 1979

APPENDIX.

APPENDIX

In re
MULTIDISTRICT VEHICLE AIR POLLUTION

AMF, INCORPORATED
Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION,
Ford Motor Company, Chrysler Corporation,
American Motors Corporation and
Automobile Manufacturers Association, Inc.,
Defendants-Appellees.

No. 76-1648

United States Court of Appeals, Ninth Circuit

Feb. 14, 1979

Howard Adler (argued), Bergson, Borkland, Margolis & Adler, Washington, D.C., for plaintiff-appellant.

James G. Hunter, Jr. (argued), Hedland, Hunter & Lynch, Chicago, Ill., Philip K. Verleger (argued), of McCutchen, Black, Verleger & Shea, Los Angeles, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before SNEED and HUG, Circuit Judges, and EAST,* District Judge.

SNEED, Circuit Judge:

This is an appeal from summary judgments in a treble damage antitrust action brought by appellant AMF, Incorporated ("AMF") against appellees, four major American automobile manufacturers and their trade association. AMF claims that appellees, acting in concert, by agreeing not to purchase AMF's device, excluded it from the early market in methods to limit and control air pollution, and that such action caused commercial injury cognizable under Section 4 of the Clayton Act, 15 U.S.C. § 15. Following the close of discovery, appellees moved for summary judgment contending that (1) the industry's rejection of the AMF device was strictly the result of unilateral decisions by each automobile company; (2)

*Hon. William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

there never was an AMF device to boycott because only a prototype had been certified by the California Motor Vehicle Pollution Control Board ("MVPCB"); (3) AMF's action was barred by the statute of limitations; and (4) AMF had transferred relevant documents to another company or lost them when it terminated its exhaust control device business. Appellee Chrysler moved separately for summary judgment on the added ground that it had at all times been firmly committed to its own device. The district court granted the appellees' motions for summary judgment with respect to all issues relevant to this appeal. As we agree that the four-year statute of limitations in 15 U.S.C. § 15b barred this action, we affirm without reaching the district court's other grounds.

I.

FACTS

AMF commenced this action on October 23, 1970, charging that appellees conspired to restrain trade and monopolized in violation of Sections 1 and 2 of the Sherman Act. The roots of this alleged conspiracy extend back to the early 1950's, when appellees entered into a cooperative program to study and remedy problems generated by emissions from internal combustion engines. One part of the joint program included a cross-licensing agreement for patents developed by any party. AMF further alleges that within this overall conspiracy appellees, in 1964, formed a conspiracy specifically intended to exclude it from the developing market for automobile emission control equipment.

In 1961 AMF entered into a program to develop an afterburner designed by Charles Morris; AMF termed its device the "Smog Burner." Afterburners reduce

emissions by further combustion of exhaust gasses. They are "hang on" devices, in that they are attached toward the end of the exhaust system, and are not integral parts of the engine itself. Although various appellees had experimented with afterburner devices, none was concentrating its own internal development upon such a device in 1964. At that time no state or federal agency mandated particular emission control standards. Under California law, however, the MVPCB was authorized to issue "Certificates of Approval" to pollution control devices found capable of achieving certain standards. The law specified that as soon as the MVPCB certified two such devices, a provision requiring all new automobiles sold within the state to meet established emission requirements would become effective. AMF submitted a prototype of its device to the MVPCB, and on June 17, 1964, the MVPCB certified AMF's prototype along with three other emissions control methods, none of which were afterburners. At that time, no appellee had a device that had received certification. Nevertheless, as of June 17, 1964, California law required appellees to seek exemptions or meet the established emission requirements in the 1966 model year, which commenced in the Fall of 1965.

AMF cites several actions on the part of appellees which indicated a joint decision to exclude parties outside of the industry cooperative program from the market in these devices. Specifically, after concerted discussion, appellees each announced at an August 12, 1964 MVPCB meeting that they would install industry-developed emission control systems in 1966 models and would refrain from using AMF's Smog Burner or any of the other previously certified devices. At various times each appellee directly contacted AMF to this effect,

the last such refusal coming from American Motors in October. According to an internal AMF memorandum dated October 29, 1964, AMF was unable to get any appellee to consider the Smog Burner even for vehicles for which exemption from the California requirements was requested. In October when American Motors Corporation, after testing of the AMF device, stated that it would not use the Smog Burner, AMF personnel had concluded that a conspiracy to exclude them existed.

In November the MVPCB denied certification for use on used cars to the only device, other than AMF's, that had applied for such certification, with the consequence that California's provisions requiring the installation on used cars did not go into effect. By December, AMF had begun to decrease its staff working on the Smog Burner project. AMF had foreseen two possible markets for the device—new and used cars—and neither had developed. On January 7, 1965, the MVPCB met to consider exemption requests by appellees for certain models; AMF did not attend. AMF did not send a representative because, as its management stated, it had a "conviction that no purchase orders for Smog Burners would emanate from any Detroit manufacturer." An AMF representative contacted two Ford engineers in April of 1965, asking whether Ford had any new interest in the Smog Burner; he received a negative response. Finally, a letter to International Harvester, not named as a defendant in AMF's suit, sent in February 1965 quoted prices of the device, but did not indicate production capability.

During this period, each of the appellees worked on an emission control system for its cars. Chrysler developed its own "Clean Air Package" (CAP), and the other three manufacturers adopted an air injection system operated with an air pump supplied by GM. Each of the appellees

did some testing with the AMF prototype during the Summer of 1964, but only AMC ever tested a production model. Chrysler's CAP system was certified in November 1964, but none of the other three manufacturers received certification or exemption until the Spring of 1965.

II.

LIMITATIONS

Appellant filed this suit on October 23, 1970. 15 U.S.C. § 15b establishes the applicable limitations: "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years *after the cause of action accrued*" (emphasis added). The government commenced a civil suit against these same appellees, however, on January 10, 1969. 15 U.S.C. § 16(b) suspends the running of the statute of limitations for "every private right of action . . . based in whole or in part on any matter complained of" in the private action during the pendency of and for one year after any antitrust action commenced by the United States. The government suit was settled by consent decree October 29, 1969, within one year of AMF's filing this suit. We therefore focus our attention on January 10, 1965, four years prior to the commencement of the government action, as the critical date for limitations purposes.[1] If appellant's action had accrued before that date, this action is barred by 15 U.S.C. § 15b.

[1] Appellees have argued that the government suit did not toll limitations because it was not "based in whole or in part on the matter complained" of in the suit by AMF. In light of our conclusion that limitations bars this suit even if 15 U.S.C. § 16(b) applies, we do not reach this question.

Previously, we have stated: "A civil cause of action under the [antitrust laws] arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time." *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1270 (9th Cir. 1975). Under two possible theories, AMF's cause of action arose on January 10, 1965 or thereafter. First, if appellees committed overt acts which damaged AMF, in furtherance of a conspiracy, on January 10, 1965 or thereafter, those acts are not barred. Second, if damages attributable to appellees' actions prior to January 10, 1965, were speculative, or their amount and nature were unprovable, as of that date, then AMF's action to recover those damages is not barred. We treat each of these possibilities in turn.

A. Continuing Conspiracy

It is well established that a plaintiff's cause of action for damages under the antitrust laws is not barred simply because a conspiracy was formed outside the limitations period. The Supreme Court clarified the point at which an antitrust cause of action accrues in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971).

> Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . This much is plain from the treble-damage statute itself. 15 U.S.C. § 15. In the context of a continuing conspiracy to violate the antitrust laws . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

401 U.S. at 338, 91 S.Ct. at 806.

Cf. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968) (damages not barred by limitations may be recovered in suit brought in 1955 for injury caused by prohibited practice begun in 1912 and continued through date of suit). AMF can recover only for damages *caused* by forbidden "overt acts" of the conspirators within the limitations period. *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F.2d 196, 208 (9th Cir. 1950), *cert. denied*, 340 U.S. 943, 71 S.Ct. 506, 95 L.Ed. 680 (1951). In this case we find the undisputed record indicates that appellees' decisions not to purchase the afterburner devices from AMF were final prior to January 10, 1965. AMF's exclusion from the afterburner market was complete prior to January 10, 1965. No forbidden "overt acts" occurred thereafter; appellees merely supplied their needs from sources other than AMF. AMF's position resembles that of a disappointed patron of the theater. When turned away from the theater at eight o'clock because the performance is sold out, his exclusion occurs at eight, not during the performance or when it concludes at eleven o'clock. *Pari ratione*, AMF's cause of action arose before January 10, 1965 and is barred by 15 U.S.C. § 15b.

AMF argues, however, that appellees' rejection of its device prior to January 10, 1965 was not a final rejection. To continue the theater example, it argues that it was not irrevocably excluded at eight o'clock but rather was told to call again just before curtain time at eight-thirty. Exclusion, therefore, could not be final until eight-thirty. Specifically, it argues that under *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957), the refusal to

deal was not final, and that each day without an order constituted a new cause of action. To support this view, AMF points to asserted new refusal by Ford and International Harvester in early 1965 as forbidden "overt acts" of the continuing conspiracy. It also argues that pricing announcements and other activity by appellees to achieve certification of their methods constituted similar acts.

We note to begin with that *Flintkote* was concerned with the period of time for which damages were recoverable, not the period of time within which suit must be brought. It limited damages suffered from a continued refusal to deal to those prior to the filing of suit. Recompense for wrongful acts subsequent to the suit must be sought in later suits. Here the question is whether AMF's injury was the consequence of multiple wrongs or a single irrevocable and permanent injury. If the injury was final during 1964, then the purpose of 15 U.S.C. § 15b as a statute of repose should be served. *See Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867 (9th Cir.), *cert. denied*, ___ U.S. ___, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978). This purpose has been described as follows: "The function of the limitations statute is simply to pull the blanket of peace over acts and events which have themselves already slept for the statutory period, thus barring proof of wrongs imbedded in time-passed events." *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 127 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054, 96 S.Ct. 784, 46 L.Ed.2d 643 (1976).

In *Poster Exchange, supra*, the Fifth Circuit clearly distinguished between injury final at its inception and a continuing wrong. A conspiracy had excluded Poster Exchange from access to supplies for a period stretching beyond the four-year limitations period. The court,

unable to determine whether during the limitations period there was "a mere absence of dealing, or whether there was some specific act or word" of a wrongful nature, remanded for a determination of whether such acts or words occurred within the period. 517 F.2d at 128. Nevertheless, the court recognized:

> Where the violation is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts, then the acts causing damage are unrepeated, and suit must be brought within the limitations period and upon the initial act.

Id. at 126-27.

The Fifth Circuit recently adhered to this principle when it observed: "[W]here all the damages complained of necessarily result from a pre-limitations act by defendant, no new cause of action accrues for any subsequent acts committed by defendant within the limitations period *because those acts do not injure plaintiff.*" *Imperial Point Colonnades Condominium, Inc. v. Mangurian,* 549 F.2d 1029, 1035 (5th Cir.), *cert. denied,* 434 U.S. 859, 98 S.Ct. 185, 54 L.Ed.2d 132 (1977) (emphasis original).

These views support our disposition of this case. Any injury to AMF is attributable to the final denials by the appellees in 1964. Contacts initiated by AMF to Ford and International Harvester do not indicate otherwise. These, to continue the theater example, were not invited pre-curtain calls at the box office; rather they were forlorn inquiries by one all of whose reasonable hopes had been previously dashed. That is, appellees had indicated clearly and irrevocably an intent to look to their own devices or modifications thereof for the 1966 model year. The original equipment supply market to

automobile manufacturers differs substantially from other supplier relationships. Any part must be integrated into the full car design. Planning is essential, and planning requires lead time. In this case, the record indicates AMF itself was convinced by the last quarter of 1964 that it was out of the market. By that time, AMF had even failed to gain access to the used car market. The staff for the Smog Burner was substantially disassembled in December 1964. AMF failed to have a representative attend a January 7, 1965 MVPCB meeting in part because it believed appellees would not order from it. Whatever hope of business AMF may have clutched, its source could not have been actions or words of the appellees. Nothing in the record indicates other than that the 1964 decisions, as to AMF, were irrevocable, immutable, permanent and final. For this reason, all injury to AMF necessarily resulted from the 1964 rejection of the Smog Burner. Acts subsequent to January 10, 1965, to use the language of *Poster Exchange,* were "but unabated inertial consequences of some pre-limitations action." 517 F.2d at 128.

B. Speculative Damages

Turning to AMF's second ground for avoiding the bar of limitations, we acknowledge that the Supreme Court has recognized in *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77, that an accrual of damages can constitute the accrual of a cause of action even though all wrongful acts took place outside the limitations period:

> [E]ven if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the

fact of their accrual is speculative or their amount and nature unprovable.

> . . . [R]efusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered . . . .

401 U.S. at 339, 91 S.Ct. at 806 (citations omitted).

This court interpreting *Zenith*, has stated:

> *Zenith* stands for the proposition that a plaintiff may recover for acts violative of the antitrust laws committed prior to the statute of limitations date, but that he may only recover those damages for such acts which accrued and became ascertainable within the period of the statute.

Hanson v. Shell Oil Co., 541 F.2d 1352, 1361 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977). Applying this standard, AMF could maintain this action if, as of January 10, 1965, its damages were speculative, or their amount and nature were unprovable.

Zenith did not establish new standards for determining whether damages are ascertainable as of a particular date.

> The principal cases explaining the criteria for ascertaining whether damages are speculative remain *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 90 L.Ed. 652 (1946), and *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-66, 51 S.Ct. 248, 75 L.Ed. 544 (1931). These cases teach that when the defendant's wrong has been proven, "the jury may make a just and reasonable estimate of the damage . . . . '[J]uries are allowed to act upon probable and inferential, as well as direct and positive proof.'" 327 U.S. at 264, 66 S.Ct. [574] at 580.

Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570, 573 (4th Cir. 1976).

In *Bigelow* and *Story Parchment Co.* the Court faced the question whether damages were too uncertain for a jury to award damages. It is distinguished uncertain *damage*, which prevented recovery, from an uncertain *extent* of damage, which did not prevent recovery; that is, the failure to establish an injury, from the not uncommon imprecision with regard to its scope. The Court emphasized that a wrongdoer should not profit from uncertainty caused by his own wrong. "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery." *Story Parchment Co.*, 282 U.S. at 565-66, 51 S.Ct. at 241.

In *Zenith* such a way was found. Damages arising more than five years after a 1954 agreement to exclude the plaintiff from the Canadian market were held to have been too speculative as of 1954 and thus not barred by a limitations period commencing in 1954. The Court sought to assure that antitrust plaintiffs would not suffer injury that could never be remedied. It believed the defendants could have prevented Zenith from any recovery for post-1958 damages in a 1954 suit by claiming that any injury past that date was speculative. Such also was the result in *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018, 92 S.Ct. 680, 30 L.Ed.2d 666 (1972), in which suit was brought in 1968 stemming from the 1963 termination of a distributorship agreement. The court held that damages accruing between 1964 and 1968 would have been too

speculative for suit in 1963 and that, as a consequence, could be recovered in the 1968 suit.

The standard established in *Story Parchment Co.* does not always lead to a *Zenith* result, however. Thus in *Charlotte Telecasters, supra,* 546 F.2d 570, the Fourth Circuit held that future profits of a cable television system were not too speculative to be subject to proof. *See El Paso v. Darbyshire Steel Co.,* 575 F.2d 521 (5th Cir. 1978). Also in *Monona Shores, Inc. v. United States Steel Corp.,* 374 F.Supp. 930 (D. Minn. 1973), a district court held that the extent of damages flowing from a foreclosure subject to further judicial proceedings was ascertainable as of the date the foreclosure was commenced. The court stated:

> It should be noted that the *Zenith* case does not require that the plaintiff have the best evidence possible of his damage, but rather only that the damages be provable. . . . [I]n some cases . . . damages are better proven at a later time. However, that does not mean at an earlier point in time, enough evidence of damage was not available to allow the issue to go to the jury.

374 F.Supp. at 936.

In this case each appellee during 1964 had expressed without qualification its intention not to use the Smog Burner. AMF admits that by the end of 1964, the size of the market for 1966 model year cars could be estimated with reasonable accuracy. AMF had been counting on this one year model market to establish its product; without it the Smog Burner project in late 1964 was being phased out. Appellees are accused of an absolute exclusion of AMF. No difficulties with projecting market share existed in late 1964 that do not exist today. We hold, therefore, that the undisputed facts establish that

the fact of injury to AMF was certain prior to January 10, 1965, and that the extent of such damage was neither too speculative nor its amount or nature unprovable. This being the case, without regard to the other issues raised on appeal, this action is barred by 15 U.S.C. § 15b and the district court properly entered judgment for appellees.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1648

April 18, 1979

In re:
MULTIDISTRICT VEHICLE AIR POLLUTION

AMF, INCORPORATED,
Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, AMERICAN MOTORS CORPORATION and AUTOMOBILE MANUFACTURERS ASSOCIATION, INC.,
Defendants-Appellees.

ORDER

Before: SNEED and HUG, Circuit Judges, and EAST,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Sneed and Hug have voted to reject the suggestion for a rehearing en banc, and Judge East has recommended rejection of the suggestion for rehearing en banc.

*Hon. William G. East, Senior United States District Judge, for the District of Oregon, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.